

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SNOHOMISH COUNTY FARM BUREAU,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

**CASE No. 15-3-0003
(SCFB IV)**

ORDER OF DISMISSAL

THE PETITION

The Snohomish County Farm Bureau (Farm Bureau) filed a petition with the Growth Management Hearings Board (Board) seeking review of Snohomish County Ordinance No. 14-120: "Ordinance for Alteration of System Improvements, Diking Improvement District No. 5." Ordinance 14-120 authorizes changes to the diking system along Union Slough to construct the Smith Island Restoration Project for salmon recovery purposes. The existing easterly dike will be breached and a new setback dike built in a project that will allow twice-daily tidal inundation of approximately 400 acres currently designated as agricultural land under the Growth Management Act (GMA). The petition states the Farm Bureau "is deeply concerned that the many dike removal and saltwater flooding projects in Snohomish County will destroy thousands of acres of farmland which is designated agricultural land under the Snohomish County GMA Comprehensive Plan."¹

Upon receipt of the petition, the Board requested the parties to brief the question whether the Board has subject matter jurisdiction to review the ordinance.² Having fully

¹ Petition for Review (June 2, 2015), GMHB Case No. 15-3-0003, p. 1.

² WAC 242-03-530 provides the presiding officer shall have the authority to "inspect the petition for review to determine whether, on its face, compliance with the jurisdiction and standing requirements of the act is shown, and if compliance is not shown, to recommend an action or to refer the issue to the board for resolution."

1 considered the briefs of the parties³ and the cited authorities, the Board concludes the Farm
2 Bureau's challenge to Ordinance 14-120 is not within its review jurisdiction. The Board's
3 jurisdiction is limited to adoption or amendment of comprehensive plans and development
4 regulations. RCW 36.70A.280(1)(a), RCW 36.70A.290(2). Ordinance 14-120, however, is a
5 component of a project permit, a site-specific land use action excluded from Board review
6 as set forth below. The petition for review is therefore dismissed.
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8 **BOARD ANALYSIS**

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10 The growth management hearings board has the powers, and only those powers,
11 granted by statute, either specifically or by implication. *Skagit Surveyors and Engineers v.*
12 *Friends of Skagit County*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998). The GMA "is not to be
13 liberally construed." *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25
14 (2005). The Board's jurisdiction is limited to review of comprehensive plans or development
15 regulations adopted or amended under the Growth Management Act (GMA), chapter
16 36.70A RCW, or the Shoreline Management Act (SMA), chapter 90.58 RCW. RCW
17 36.70A.280 specifies:
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- 19 (1) The growth management hearings board shall hear and determine *only*
20 those petitions alleging either:
21 (a) That, except as provided otherwise by this subsection, a state agency,
22 county, or city planning under this chapter is *not in compliance with the*
23 *requirements of this chapter*, chapter 90.58 RCW as it relates to the
24 adoption of shoreline master programs or amendments thereto, or
25 chapter 43.21C RCW as it relates to plans, development regulations, or
26 amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.
(Emphasis added)

27 RCW 36.70A.290 elaborates:

- 28 (2) All petitions relating to whether or not *an adopted comprehensive plan,*
29 *development regulation, or permanent amendment thereto*, is in
30 compliance with the goals and requirements of this chapter or chapter
31 90.58 or 43.21C RCW must be filed within sixty days after publication as
32 provided in (a) through (c) of this subsection. (Emphasis added).

³Petitioner's Opening Brief re Subject Matter Jurisdiction, June 23, 2015; Snohomish County's Response re Request for Expedited Briefing on Jurisdiction, July 7, 2015; Petitioner's Reply Brief re Subject Matter Jurisdiction, July 10, 2015.

1 The jurisdictional purview of the Board was underscored by the Washington Supreme
2 Court in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d
3 123 (2000):

4 The GMA . . . limits the kinds of matters that GMHBs may review: “A growth
5 management hearings board shall hear and determine only those petitions
6 alleging . . . [t]hat a state agency, county, or city planning under this chapter
7 is not in compliance with the requirements of this chapter. . . .” RCW
8 36.70A.280(1)(a). Another provision of the GMA spells out in greater detail
9 the subject matter of each petition: “All petitions relating to whether or not an
10 adopted comprehensive plan, development regulation, or permanent
11 amendment thereto, is in compliance with the goals and requirements of this
12 chapter . . . must be filed within sixty days after publication. . . .” RCW
13 36.70A.290(2). From the language of these GMA provisions, we conclude
14 that *unless a petition alleges that a comprehensive plan or a development
15 regulation or amendments to either are not in compliance with the
16 requirements of the GMA, a GMHB does not have jurisdiction to hear the
17 petition.* (Emphasis added)

16 The Farm Bureau challenges Snohomish County’s (County) adoption of Ordinance
17 14-120, which approves a petition for alteration of the system of improvements for Diking
18 Improvement District No. 5 (Diking District). The jurisdictional question hinges on whether
19 this ordinance adopts or amends a comprehensive plan or development regulation. The
20 Board concludes it does not.

22 Ordinance 14-120 is a component of the site-specific project permit for the Smith
23 Island Restoration Project. The Ordinance authorizes changes to the diking system for
24 Smith Island, breaching an existing dike and building a new setback dike. Project permit
25 actions are addressed in the Land Use Petition Act (LUPA), chapter 36.70C RCW. RCW
26 36.70C.020(4) defines the term “project permit” as follows:
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1 "Project permit" or "project permit application" means *any land use or*
2 *environmental permit or license required from a local government for a*
3 *project action*, including but not limited to . . . shoreline substantial
4 development permits . . . but excluding the adoption or amendment of a
5 comprehensive plan, subarea plan, or development regulations. . . .
(emphasis added).

6 Ordinance 14-120 authorizes modifications to the existing system of diking improvements, a
7 step that is required for the Smith Island Restoration Project; thus it is "a land use . . . permit
8 . . . required from a local government for a project action."

9 The Supreme Court explained the dichotomy between Growth Board and LUPA
10 jurisdictional review in *Woods v. Kittitas County*, 162 Wn.2d 597, 609-10, 174 P.3d 25
11 (2007), holding: "GMHBs do not have jurisdiction to decide challenges to site-specific land
12 use decisions because site-specific land use decisions do not qualify as comprehensive
13 plans or development regulations." The ruling was echoed by the Court of Appeals in *BD*
14 *Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board*, 165
15 Wn. App. 677, 684, 269 P.3d 300 (2011): "The Board does not have jurisdiction to decide
16 challenges to project permit applications or site-specific land use decisions, because such
17 decisions do not qualify as comprehensive plans or development regulations."

18 In a previous challenge to the Smith Island Restoration Project,⁴ *Snohomish County*
19 *Farm Bureau v. Snohomish County (SCFB III)*, Case No. 14-3-0013, the Farm Bureau
20 sought Board review of an interlocal agreement (ILA) between the County and the Diking
21 District which set parameters for the project. The Board determined that the ILA was a step
22 in implementing the shoreline substantial development permit required for the project and
23 thus was a project permit action. The Board dismissed the ILA challenge for lack of subject
24 matter jurisdiction, stating:
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⁴This is the fourth time the Farm Bureau has challenged the County's Smith Island dike realignment before this Board: *Snohomish County Farm Bureau v. Snohomish County and Department of Ecology (SCFB I)*, Case No. 12-3-0008, Final Decision and Order, (March 14, 2013); *Snohomish County Farm Bureau v. Snohomish County (SCFB II)*, Case No. 12-3-0010, Final Decision and Order (May 2, 2013); *Snohomish County Farm Bureau v. Snohomish County (SCFB III)*, Case No. 14-3-0013, Dismissal on Motions (February 4, 2015).

1 [T]he Farm Bureau has pointed to no authorities that would allow the Board
2 to assert jurisdiction over an ILA that on its face is a component of a site-
3 specific project permit for the Smith Island restoration.⁵

4 The ILA stated that the next step in the Smith Island Restoration Project would be for the
5 County to authorize modifications to the existing system of diking improvements:

6 1.2 The COUNTY, as owner of land within the DISTRICT, shall file a petition
7 in accordance with RCW 85.08.540 with the Snohomish County Council,
8 requesting that the existing system of diking improvements be altered to
9 construct a new setback dike and breaching a portion of the existing dike as
10 set forth in the PROJECT.⁶

11 The County adopted Ordinance 14-120 to satisfy this permit requirement.

12 The Board has read Ordinance 14-120 and its attachments carefully and can find no
13 basis for characterizing it as anything other than a site-specific project permit action. The
14 ordinance approves changes to the existing dike alignment, adopts a site plan, and accepts
15 a county engineer's report which details the work that will be required to build the project.
16 The ordinance authorizes the public works department to prepare construction plans and
17 specifications and to issue bid documents. The ordinance pertains only to the Smith Island
18 Restoration Project and is a "land use or environmental permit or license required from a
19 local government for a project action" within the definition of "project permit" in RCW
20 36.70C.020(4).
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22 The Board understands the Farm Bureau's concern that the 400 acres to be
23 inundated by the restoration project is designated agricultural land in the County's
24 comprehensive plan and that the County's action appears to violate the GMA duty to
25 conserve agricultural land. However, the Board's review jurisdiction is limited to actions that
26 adopt or amend comprehensive plans or development regulations. Ordinance 14-120,
27 "Ordinance for Alteration of System Improvements, Diking Improvement District No. 5," is a
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31 ⁵ *Snohomish County Farm Bureau v. Snohomish County (SCFB III)*, Case No. 14-3-0013, Order of Dismissal
32 on Motions, (February 4, 2015), p. 6.

⁶ Interlocal Agreement Between Snohomish County and Diking Improvement District 5 Concerning
Construction and Post Construction Commitments Relative to Smith Island Restoration Project, dated July 2,
2014, p. 3, attached as Exhibit A to Petition for Review (November 12, 2014), *Snohomish County Farm
Bureau v. Snohomish County (SCFB III)*, Case No. 14-3-0013.

1 site-specific project permit action, not a comprehensive plan or development regulation
2 amendment subject to the Board's jurisdiction under RCW 36.70A.280. Therefore, the
3 Board dismisses the Farm Bureau's challenge to Ordinance 14-120 for lack of subject
4 matter jurisdiction.

5 The parties' briefs raise two other arguments which merit brief Board comment. First,
6 the County points out Ordinance 14-120 was adopted under the authority of RCW 85.08.540
7 which vests in the County legislative body the power to approve modification of diking
8 improvements.⁷ The County asserts the Board's jurisdiction does not extend to statutes
9 beyond the GMA, SMA, and SEPA and thus this action is beyond the Board's reach.⁸ The
10 Farm Bureau, in response, asserts the authority under which the ordinance is enacted is not
11 determinative of jurisdiction when the issue raised is compliance with the GMA, not
12 compliance with the authorizing statute. The Board agrees with the Farm Bureau on this
13 point.
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15 The Board's decisions indicate jurisdiction must be denied when the petitioner asks
16 the Board to determine **whether the action complies with a statute other than GMA,
17 SMA, or SEPA.**⁹ See, e.g., *Anderson Creek v. City of Bremerton*, Case No 95-5-0053c,
18 Order on Dispositive Motion (October 18, 1995) at 7 (no jurisdiction to review actions for
19 compliance with Title 35 RCW as it relates to annexations); *Weyerhaeuser v. Thurston*
20 *County*, Case No. 10-2-0020c, Amended Final Decision and Order (June 17, 2011), p. 9
21 ("The Board has not been granted jurisdiction to determine compliance with the Planning
22 Enabling Act."); *South Bellevue Partners v. City of Bellevue*, Case No. 95-3-0055, Order of
23 Dismissal (November 30, 1995), p. 8 (reaffirming prior holdings that the Board lacks
24 jurisdiction to determine compliance with the impact fees statute, chapter 82.02 RCW).
25 However, the petition need not be dismissed where the question raised is **whether the
26 action complies with the GMA.** See e.g., *Fallgatter V v. City of Sultan*, Case No. 06-3-
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30 ⁷ RCW 85.08.540: [T]he county commissioners . . . may cause any system of improvement to be altered,
31 reduced, enlarged, added to or in any other manner bettered or improved, either within or without the district,
32 and to effect such subsequent improvements, may exercise any of the powers which are in this chapter, or
may hereafter be conferred upon such districts.

⁸ Snohomish County's Response re Request for Expedited Briefing on Jurisdiction (July 7, 2015), pp. 5-6.

⁹ The GMA at RCW 36.70A.280 and RCW 36.70A.290 authorizes the Board to determine compliance only with
the GMA, SMA, and SEPA.

1 0003, Order on Motions (January 24, 2006), p. 7 (“[T]he Board has no jurisdiction to review
2 the challenged sewer or water plans for compliance with chapters 90.48, 35.67, or 43.20
3 RCW. However, since these plans were incorporated into the City’s capital facilities element
4 to fulfill certain GMA requirements, they fall within the Board’s review parameters.”)

5 Here the Farm Bureau’s reply brief makes a convincing argument that GMA
6 compliance is the heart of its petition:
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8 Nor can the Board and the county pretend that the SCFB petition in the case
9 at bar alleges non-compliance with Chapter 85.08 RCW. Obviously the
10 petition does not so allege (The petition doesn’t even mention Chapter 85.08
11 RCW), but to the contrary expressly alleges non-compliance with Chapter
12 36.70A RCW.¹⁰

13 The Board notes the petition alleges the ordinance “violates the GMA mandate for
14 protection and conservation of designated agricultural land,” citing specifically RCW
15 36.70A.060(1)(a), RCW 36.70A.020(8), RCW 36.70A.070(1) and (5)(c)(v), and RCW
16 36.70A.177(1).¹¹ The Board concludes that the fact the challenged ordinance was adopted
17 under non-GMA statutory authority would not by itself support denial of Board review
18 jurisdiction. Nevertheless, jurisdiction fails because the ordinance is not a plan or
19 development regulation amendment.

20 To this, the Farm Bureau argues the ordinance is a **tacit amendment** of the County’s
21 zoning code and thus is within the Board’s review jurisdiction. The Farm Bureau points out
22 the entirety of Smith Island is designated agricultural and zoned Agriculture-10 Acres (Ag-
23 10). The intent, function, and allowed uses of the Ag-10 zone are set forth in SCC
24 30.12.025(3)(c) with a use matrix at SCC 30.22.110.

25 The Farm Bureau notes the Ag-10 regulations promote continuation of farming and
26 provide “no allowed use for ‘fish habitat’ or the like.”¹² The Bureau asserts that the Diking
27 District alterations in Ordinance 14-120 “command[s] conversion of designated agricultural
28 land to a use which destroys the future agricultural utility of the land, without first docketing
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¹⁰ Petitioner’s Reply Brief re Subject Matter Jurisdiction, (July 10, 2015), p. 3.

¹¹ Petition for Review, p. 2-3.

¹² Petitioner’s Opening Brief re Subject Matter Jurisdiction (June 23, 2015), p 6.

the proposal and re-designation to an appropriate non-agricultural designation.”¹³ The Farm Bureau reads Ordinance 14-120 as a tacit amendment of the County’s development regulations:

Ordinance 14-120 amends the SnoCo development regulations by tacitly inserting an unwritten “fish habitat” allowable use into the Ag-10 use matrix. Therefore the Board has subject matter jurisdiction of the PFR under RCW 36.70A.290(2) because the PFR relates to whether a permanent amendment to a development regulation is in compliance with the goals and requirements of the GMA.¹⁴

The Farm Bureau offers no authority for the Board to exercise review jurisdiction based on “tacit amendment” to a development regulation, nor has the Board found such authority.¹⁵ Lacking authority, the Board declines to extend its reach.

In conclusion, the petition for review here does not fall within the Board's jurisdiction. Ordinance 14-120, "Ordinance for Alteration of System of Improvements, Diking Improvement District No. 5," is a site-specific project permit action, not a comprehensive plan or development regulation amendment subject to Board review. The matter must be dismissed.

ORDER

Based on the foregoing, the petition for review in Case No. 15-3-0003 is **dismissed for lack of subject matter jurisdiction** and the case is **closed**.

¹³ *Id.* p. 7.

¹⁴ *Id.* p. 8.

¹⁵ The Court of Appeals in *Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541, 548-9, 144 P.3d 1219 (2006), ruled that an interlocal agreement which contravened an adopted comprehensive plan policy was a *de facto* comprehensive plan amendment within Board jurisdiction. The court's reasoning has not been extended to development regulations.

1 ENTERED this 22nd day of July, 2015.

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4 Margaret A. Pageler, Board Member

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7 Cheryl Pflug, Board Member

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10 William Roehl, Board Member

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13 **Note: This is a final decision and order of the Growth Management Hearings Board**
14 **issued pursuant to RCW 36.70A.300.¹⁶**

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32 ¹⁶ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.